CASE SCHEDULED FOR ORAL ARGUMENT APRIL 24, 2007

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-1419, 05-1420 and 06-1087 (Consolidated)

OHNGO GAUDADEH DEVIA, et al.,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA
Respondents, and

PRIVATE FUEL STORAGE, L.L.C. and
SKULL VALLEY BAND OF GOSHUTE INDIANS
Intervenors-Respondents.

On

Petition to Review a Final Decision of the
United States Nuclear Regulatory Commission

BRIEF OF INTERVENORS PRIVATE FUEL STORAGE, L.L.C. AND SKULL VALLEY BAND OF GOSHUTE INDIANS

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Dated: March 15, 2007

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OHNGO GAUDADEH DEVIA, et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, Respondents, and PRIVATE FUEL STORAGE, L.L.C. and SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors.	)	Nos. 05-1419, 05-1420, and 06-1087 (consolidated)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amici

All parties, intervenors, and *amici* appearing in this court are listed in the Briefs for the Respondents and Petitioners.

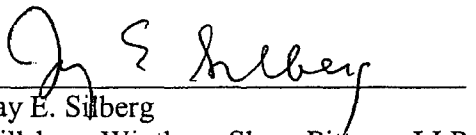
II. Rulings Under Review

References to the rulings at issue appear in the Brief for the Respondents.

III. Related Cases

Related cases are identified in the Brief for the Respondents.

Respectfully submitted,



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PRIVATE FUEL STORAGE, L.L.C.'S
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 15(c)(6) and Private Fuel Storage, L.L.C. ("PFS") submits this Corporate Disclosure Statement. PFS is a Delaware limited liability company. The PFS members with 10% or more ownership interest are Genoa Fueltech, Inc.; Northern States Power Company doing business as Xcel Energy; Indiana Michigan Power Company, Inc.; Entergy Nuclear Indian Point 2, L.L.C.; Southern Company; and Florida Power and Light Company.

Respectfully submitted,

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

AEA	Atomic Energy Act of 1954
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
CDF	Cumulative Distribution Function
DOE	U.S. Department of Energy
FEIS	Final Environmental Impact Statement
GROA	Geologic Repository Operations Area
ISFSI	Independent Spent Fuel Storage Installation
MRS	Monitored Retrievable Storage
NEPA	National Environmental Policy Act
NRC	United States Nuclear Regulatory Commission
OGD	Ohngo Gaudadeh Devia
PFS	Private Fuel Storage, L.L.C.
PFSF	Private Fuel Storage Facility
PRA	Probabilistic Risk Assessment
UEP	Unanalyzed Event Probability

BRIEF OF INTERVENORS PRIVATE FUEL STORAGE, L.L.C. AND SKULL VALLEY BAND OF GOSHUTE INDIANS

Private Fuel Storage, L.L.C. ("PFS") and the Skull Valley Band of Goshute Indians (the "Band") submit this brief in support of the Federal Respondents.

JURISDICTIONAL STATEMENT

PFS and the Band ("Intervenors") agree with the Jurisdictional Statement in Respondents' Brief.

QUESTIONS PRESENTED

Intervenors agree with the questions presented in Respondents' Brief.

STATEMENT OF THE CASE

Intervenors adopt Respondents' Statement of the Case with additions below.

A. Nature of the Case

On June 20, 1997, PFS submitted a license application to NRC to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") for the temporary storage of spent nuclear fuel on the Band's reservation. On September 9, 2005, after more than eight years of protracted adjudication that generated more than 70 published NRC decisions, the Commission authorized issuance of the license.[1] 62 NRC 403, 424 (2005) (JA0910). The Commission observed that this "adjudicatory effort, plus [the NRC] Staff's separate safety and environmental reviews, gives us reasonable assurance that PFS's proposed ISFSI can be constructed and operated safely." Id.

NRC's ISFSI licensing process includes a thorough technical review by the NRC Staff as well as an opportunity for hearing. The Staff technical review covers safety issues as required by the Atomic Energy Act, as amended, 42 U.S.C. §§ 2011-2297 ("AEA"), and NRC

[1] The license was issued on February 21, 2006.

regulations, 10 C.F.R. Part 72, and environmental issues as required by the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, ("NEPA") and NRC regulations, 10 C.F.R. Part 51.

In parallel with the Staff's review, the AEA and NRC regulations provide an opportunity for adjudicatory proceedings before an independent Atomic Safety and Licensing Board ("Board"). 42 U.S.C. §§ 2231, 2239; 10 C.F.R. § 72.46. The State of Utah ("Utah") and Ohngo Gaudadeh Devia ("OGD"), a group opposed to the license, sought and were granted a hearing on the PFS application. The Board also admitted the Band as a party to the hearing in support of the application.

B. Aircraft Crashes

NRC concluded that an aircraft crash causing a radiological release at the proposed PFS ISFSI is not a credible event based on two determinations: (1) "as a matter of law and policy," the annual threshold probability for a design basis aircraft crash at an ISFSI should be set at one-in-a-million (1×10^{-6}), 54 NRC at 257 (JA0228); and (2) PFS had met the one-in-a-million standard by demonstrating that the probability of such a crash was less than 0.737 per one million (0.737×10^{-6}). 62 NRC 403 (2005) (JA0884).

NRC's determination that the probability of an aircraft crash with radiological consequences at the Private Fuel Storage Facility ("PFSF") is less then the 1×10^{-6} standard is based on two lengthy evidentiary hearings, each preceded by an extensive Staff technical review.

The first hearing (the "probability hearing"), held in 2002, focused primarily on the hazard allegedly posed by F-16 fighter aircraft transiting Skull Valley en route to the Utah Test and Training Range. 57 NRC 69, 76-77 (JA0346-0347). Nine expert witnesses testified over the course of 12 days of evidentiary hearing, and more than 220 exhibits were introduced into evidence. Based on this record, the Board concluded that the cumulative probability of an

aircraft crash at the PFSF, without considering the likelihood of the crash causing a radiological release, exceeded 1 x 10^{-6}. Id. at 77-78, 135. (JA0347-0348, 0384)[2]

A second lengthy evidentiary hearing ("the consequences hearing") was conducted in 2004 to determine whether, assuming an F-16 crashed into the PFSF, the probability of a crash causing a radiological release would be less than the 1 x 10^{-6} per year threshold. Twenty expert witnesses testified over the course of 16 days, presenting 225 exhibits, and creating a hearing transcript spanning over 4500 pages. 62 NRC at 411 (JA0892). The record included extensive computer simulations, using sophisticated computer codes, performed by all parties to model the postulated impact of an F-16 into a spent fuel cask. Id. at 419 (JA0903).

The Board reviewed this large body of highly complex technical and scientific evidence and made "countless judgments on the credence to give each expert witness." Id. at 411 (JA0892). Based on its "fact-driven evaluation of the evidence on air crash risks at the PFS facility," id. (JA0891-0892), a majority of the Board concluded that the probability of a crash-caused breach of a spent fuel storage canister resulting in a radiological release was less than 7.37 x 10^{-7} per year. LBP-05-29, at B36, B40 (JA3915, 3919). Moreover, the majority found that the actual probability of a canister breach was much less because "large conservatisms" were "built into the analyses" which resulted in material overestimation of the calculated probability, "perhaps by an order of magnitude." Id. at B37-B41 (JA3916-3920); 62 NRC at 408 & 419 n.67 (JA0888 & 0903).

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[2] PFS and the Staff requested Commission review of the Board's decision. The Commission deferred ruling on the petitions until completion of the second hearing. 57 NRC 279 (2003) (JA0687).

Utah requested reconsideration, raising arguments largely identical to those raised before this Court. After additional briefing and more than six hours of oral argument, the Board majority rejected Utah's request and reaffirmed its decision. 61 NRC 319 (2005) (JA0836).

Utah petitioned for Commission review. Upon careful review of Utah's issues, the Commission concluded that Utah had provided no basis to disturb the Board's determinations. 62 NRC at 410-24. (JA0891-0910)[3]

C. Yucca Mountain Acceptance of PFS Spent Fuel Canisters

Following Commission denial of its petition for review, Utah moved to reopen the record, claiming that a recent Department of Energy ("DOE") press release announcing a move towards standardized canisters demonstrated that Yucca Mountain would not accept PFS spent fuel canisters. This was the third time over the eight-year span of the proceeding that Utah raised this claim. 63 NRC at 22 (JA0988).

The Commission rejected Utah's motion because it failed to meet NRC's requirements for reopening a closed record. The Commission found that, even accepting Utah's claim, no material impact would occur that would require revising the Final Environmental Impact Statement prepared by NRC as part of its review of the PFSF application ("FEIS"), as Utah had claimed. The FEIS had already concluded that the impacts of transporting spent fuel were "small," and had also considered the possibility that PFS spent fuel might be shipped to a destination other than Yucca Mountain, concluding that those impacts were similarly "small." 63 NRC at 29 (JA0994).

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[3] Commissioner Jaczko dissented in part. 62 NRC at 425-28 (JA0911-0916).

D. Environmental Justice

Among many false characterizations in OGD's "Statement of the Case" is the allegation that PFS "entered into a secret agreement with Leon Bear" (the Band's former Chairman) to lease tribal lands for the project. OGD Br. at 5. NRC found differently:

> The Board in this case recognized that the Skull Valley Band as a whole "has welcomed the project," is benefiting from it, and is not complaining of environmental injustice.

56 NRC 147, 156, quoting 55 NRC 171, 189 (2002) (JA0318). The NRC record reflects that Skull Valley Band General Council Resolution 97-12A – signed by a majority of adult Band members – authorized the Band's Executive Committee to execute the lease. (JA1550-1557).

E. Alleged Mootness

On September 7, 2006, the Interior Department revoked its prior conditional approval of the Band's lease with PFS and denied PFS's application for a right-of-way across Bureau of Land Management ("BLM") land. Both PFS and the Band are actively considering seeking judicial review of these decisions.

SUMMARY OF ARGUMENT

Intervenors fully support the legal analysis set forth in Respondents' Brief. Agency determinations involving highly complex policy and technical matters, such as the Commission's threshold standard and determination of the probability of an aircraft crash causing radiological consequences at the PFSF, are owed the utmost deference. Petitioners have failed to carry their heavy burden to establish arbitrary and capricious NRC action.

The Commission's determination to apply a different threshold for ISFSIs than for reactors was based on the reasonable, fully articulated policy determination that ISFSIs pose significantly less risk than reactors because the fuel is not under pressure and radioactivity has

substantially declined. This scientific and technical determination falls squarely within the "virtually unique ... broad responsibility" vested with the Commission under the AEA.

The determination that an aircraft crash with radiological releases at the PFSF does not exceed the 1×10^{-6} threshold is based on careful evaluation of the highly complex technical and scientific record. Utah has supplied no basis to undermine the great deference due such agency determinations. Claims that the threshold standard was arbitrarily applied as a "bright line" standard, or that the analysis allegedly used non-conservative assumptions, completely ignore the "large conservatisms" that both the Board and the Commission majorities found built into the analysis. Moreover, the degree of conservatism or margin to be supplied for such determinations is again a responsibility uniquely vested with the Commission.

Claims that NRC arbitrarily refused to apply DOE ductility ratios for determining canister breach ignore the Board majority's reasoned explanation based on the extensive technical record. Utah's assertion that DOE applied such a standard at Yucca Mountain is untrue and moreover is not part of the record.

Arguments that NRC arbitrarily precluded litigation of dose consequences arising from loss of radiological shielding ignore that Utah never raised this issue until after the Board's consequences decision. No reference to dose consequences from loss of shielding is found in Utah's pleadings or expert reports, the many pre-hearing conferences, or Utah's proposed findings. Rather, Utah identified the "broad issue" for resolution as whether the probability of "a release of radioactive material . . . is less than one in a million."[4]

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[4] (JA3609) (emphasis added).

Claims that NRC arbitrarily failed to include a calculated probability for a cruise missile impact at the PFSF ignores that NRC found, based on undisputed facts, that the probability of such an impact to be essentially zero.

Claims that NEPA requires evaluation of terrorist acts ignore that NRC's licensing of the PFSF would not be the proximate cause of a possible terrorist attack. Utah's assertion that that DOE will not accept PFS canisters, even if true, has no material effect on the FEIS, and provides no basis to reopen a closed record.

OGD's alleged environmental justice claims would defeat tribal self-determination by requiring NRC to adjudicate internal tribal political disputes. This is clearly outside NRC authority and expertise and far beyond NEPA and Executive Order 12898.

Finally, OGD's assertion that this proceeding is moot because of Interior Department decisions disapproving PFS's lease of Band land and denying PFS's right-of-way application is meritless because Intervenors are entitled to pursue judicial review of those decisions.

ARGUMENT

I. NRC Reasonably Determined that an Aircraft Crash Causing a Radiological Release at the PFSF is not Credible

A. Standard of Review

Under well established precedent, great deference is to be accorded the Commission's determinations that (1) the annual threshold probability for a design basis aircraft crash at an ISFSI should be set at one-in-a-million (1×10^{-6}), and (2), based on the extensive factual record, an aircraft crash causing a radiological release at the PFSF fell substantially below this standard. This Court has long recognized that NRC's statutory charter is "virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving its statutory objectives." Siegel v. AEC, 400

F.2d 778, 783 (D.C. Cir. 1968); Accord Nuclear Info. Res. Serv. v. NRC, 969 F.2d 1169, 1177 (D.C. Cir. 1992). Moreover, a reviewing court is "at its most deferential" where, as here, the agency must "mak[e] predictions, within its area of special expertise, at the frontiers of science." Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983).

The 1 x 10^{-6} threshold standard adopted by the Commission for ISFSIs is based on its assessment of the acceptable level of risk to public health and safety. 54 NRC at 263-64 (JA0232-0233). Such risk assessments are "'necessarily a question of policy.'" Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005). Courts must apply utmost deference when reviewing agency policy judgments and "must not substitute their own policy judgments" for those of the agency. Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 360 (1st Cir. 2004) reh'g and suggestion for reh'g en banc denied (Feb. 4, 2005) (citing SEC v. Chenery, 318 U.S. 80, 88 (1943)).

Furthermore, the determination that the PFSF fell substantially below the 1x10^{-6} threshold probability was a "fact-driven evaluation" of a highly complex technical record. As this Court has recognized, "'agency determinations based upon highly complex and technical matters are 'entitled to great deference.'" West Virginia v. EPA, 362 F.3d 861, 867 (D.C. Cir. 2004) (emphasis added). Accord Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 377 (1989).

B. NRC's Adoption of the Threshold Standard of One-in One Million for Credible ISFSI Accidents was a Reasonable Policy Judgment

The Commission determined "as a matter of law and policy," based on its assessment of the acceptable level of risk to public health and safety, that the annual threshold probability for a design basis aircraft crash at an ISFSI should be set at one-in-a-million (1 x 10^{-6}). 54 NRC at

257 (JA0228). Utah argued that the Commission should have applied the one-in-ten-million (1 x 10^{-7}) standard applicable for nuclear reactors. The Commission rejected this argument because a failure at an ISFSI would not "pose nearly the same radioactive consequences as a reactor failure." Id. at 264-65 (JA0233). Rather, the Commission determined to apply the standard previously established for spent fuel activities at a geologic repository operations area ("GROA") at a high-level waste repository, which, like an ISFSI, would involve temporary storage of spent fuel. Id. at 263 (JA0232).

Utah claims that the Commission ignored its arguments in setting this standard. However, Respondents show (Br. at 59-61) that the Commission directly addressed Utah's points and found them lacking. Rather, at bottom, the Commission applied the same threshold for GROAs and ISFSIs because it assessed the consequences of an accident at the two types of facilities as essentially the same. Both facilities handle spent nuclear fuel that, unlike a reactor, is no longer undergoing fission under high heat and pressure and for which radioactivity has significantly declined. Therefore, both GROAs and ISFSIs present analogous risks distinctly different from the risks of an operating reactor.

The Commission's determination to apply the same threshold standard for GROAs and ISFSIs is fully supported by the similarities that the Commission articulated when it promulgated the 10^{-6} standard for GROAs. 54 NRC at 264 (JA0232-0233). In promulgating the GROA standard in 1996, the Commission observed that, because operations at a GROA "are expected to be similar to operations at [10 C.F.R. Part 72] facilities ..., the Commission believes that it is appropriate that their design bases be comparable."[5] Thus, the Commission believed it

[5] 61 Fed. Reg. 64,257, 64,262 (emphasis added).

appropriate to "harmonize part 60 with part 72", including their design basis events, because "part 72 applies to those facilities ... most similar to the surface facilities of a repository."[6] Id. at 64,265. Based on their similarities as determined in the 1996 GROA rulemaking, the Commission's decision to apply the same 10^{-6} threshold standard to ISFSIs is entirely reasonable.

Utah cites differences that it claims make the PFSF riskier than a GROA. As Respondents note (Br. at 60), those differences (other than Dr. Resnikoff's dose calculation) concern the probability of occurrence of an event and not its radiological consequences. Moreover, they are mostly wrong.[7] Indeed, a facility like the PFSF is considered less risky than a GROA or an MRS to which the Commission directly analogized a GROA. Unlike the PFSF, those facilities would directly handle bare spent fuel assemblies as they are moved from one cask and repackaged into another cask or container. 58 Fed. Reg. 29,795, 29,797 (May 24, 1993). Because of their "handling and repackaging" of spent fuel, the Commission requires MRS emergency plans to contain off-site emergency evacuation plans. Id. Conversely, the Commission determined not to require emergency evacuation plans for facilities like the PFSF, where the spent fuel always remains within sealed canisters, because of their reduced risks. Id.

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[6] The Commission specifically analogized GROAs to monitored retrievable storage ("MRS") facilities licensed under 10 C.F.R. Part 72. Id. As discussed infra, both types of facilities repackage spent fuel in addition to storing fuel.

[7] Utah suggests (Br. at 20) that one difference between the PFSF and the Yucca Mountain GROA is that "five-foot-thick walls surrounding the GROA facilities would provide additional protection against radiation release." Utah fails to explain, however, that the five foot walls are only part of the Waste Handling Building, and do not protect external areas where spent nuclear fuel casks will be stored upon arrival at the repository. See Yucca Mountain Science and Engineering Report Technical Information Supporting Site Recommendation Consideration, DOE/RW-0539 (May 2001) (JA1352-1353, 1355, 1358). Hence, casks containing spent fuel will sit in an open environment just as with an ISFSI.

Furthermore, the Commission properly disregarded Dr. Resnikoff's dose calculation. He never provided the input assumptions for his calculation or any reasoned basis why, given their significant similarities, the consequences for an ISFSI should be greater than those for a GROA.[8] 54 NRC at 265, n.42 (JA0233).

Finally, from an overall risk (i.e., probability x consequences) perspective, the 1 x 10^{-6} standard "is expected to provide conservative estimates of risk" for Part 60 and Part 72 facilities. 61 Fed. Reg. at 64,265 (emphasis added). Based on extensive dose consequences studies that had been performed, the Commission observed that "[a] higher screening criterion could probably be justified given the magnitude of the consequences and risks." Id. (emphasis added).

Thus, the Commission's determination of a 1 x 10^{-6} threshold for ISFSIs was a reasonable – indeed conservative – policy judgment of the type uniquely vested with the Commission under the AEA.

C. NRC Reasonably Refused to Restart the Consequences Hearing to Consider Radiation Dose Consequences Resulting from Loss of Shielding.

Utah's claims (Br. at 22-32) that NRC impermissibly foreclosed consideration of whether alleged "loss of shielding" to the cask overpack would cause doses consequences that exceed regulatory limits are merely a post hoc attempt to manufacture reversible error where none exists. As Respondents show, Utah first raised this issue in its motion for reconsideration of the Board's consequences decision. Resp. Br. at 65-70. No discussion of "loss-of-shielding" could be found in the many pre-hearing conferences preceding the consequences hearing, nor could

[8] Indeed, in ruling on the consequences resulting from postulated seismic events, the Board disregarded Dr. Resnikoff's dose calculations because of numerous "errors" and "erroneous assumptions." 57 NRC 293, 370, 541-42 (2003) (JA0540-0541, 0678-0680).

Utah point to a single instance where it had previously raised this claim. Id. And Utah never moved to reopen the record. Thus, both the Board and Commission unanimously rejected Utah's belated effort to raise a wholly new issue at the very end of this multi-year proceeding.

That Utah's claim is merely a post hoc attempt to manufacture reversible error is laid bare by its proposed findings to the Board on the consequences hearing. There, Utah declared that the "broad issue for the Board to decide is whether PFS has proven that the cumulative probability of a release of radioactive material ... is less than one in a million."[9] Repeatedly, Utah referred to the "release of radioactive material," "containment of the radioactive material, or "breach of confinement" as being the issue.[10] Nowhere did Utah's findings refer to increased radiation from "loss of shielding."[11]

A review of the record further confirms that Utah never raised radiological consequences resulting from loss of shielding as an issue. Utah's expert reports setting forth its position for the consequences hearing nowhere raised as an issue increased radiation dose due to loss of shielding. Its radiological dose expert report only assessed doses resulting from an assumed canister breach that released radioactive material into the environment.[12] Nowhere did this report, or any other Utah report, raise as an issue radiation doses resulting from damage to the

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[9] (JA3609) (emphasis added).

[10] E.g. (JA3621-3623, 3696-3698).

[11] Utah's brief (at 25-26) refers to its findings but points to no reference concerning "loss of shielding." Indeed, one of the findings it quotes expressly references "containment of radioactive material."

[12] State Exh. 281 (JA3245-3269). A second Utah radiological consequences report that concerned accidental spent fuel criticality (State Exh. 282) (JA3270-3320) likewise never raised radiation doses arising from a "loss of shielding."

cask overpack. As a result, PFS (and the NRC Staff) focused exclusively on potential radiological releases resulting from canister breach.[13]

Based on this development of the issues, as discussed in extensive pre-hearing conferences, in its April 15, 2004 Order the Board framed the issue of whether an aircraft crash is a credible event as having three parts:

> the probability of a crash into the site (already decided); the probability that such a crash will rupture a cask; and the dose consequences of the resulting radiological release.

(JA0718) (emphasis added). A "radiological release" can occur only if a canister is breached. Therefore, all understood that loss of shielding – for which the radiological consequences would be increased radiation and not a "release" – was not at issue. This understanding is further confirmed by the second part of the inquiry described as whether cask "rupture" will occur, which denotes breach and not loss of shielding. Utah never objected to the Board's framing of the issues. Had it done so, the course of the proceeding would have been different. 61 NRC at 328 (JA0846).

Utah claims that its offer of proof filed September 12, 2004 reflected its intent to litigate loss of shielding. That is untrue.[14] But even if true, it came too late. By then, the evidentiary

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[13] E.g., PFS Exh. 265, Cornell Expert Report (JA3433-3434) (focusing on probability of "radiological release").

[14] Utah points to statements in the Offer concerning alleged breaches of different barriers, Br. at 24, but ignores that (1) the Offer only claimed excessive doses arising from a potential canister breach, (JA3593-3595), and (2), the supporting reports attached to the Offer (State Exhs. 281 (JA3245-3269) and 282 (JA3270-3320), discussed supra) were solely limited to dose consequences resulting from an asserted canister breach. The Offer made no reference to "loss of shielding." The Offer refers to breaches of different barriers but solely in relation to a legal argument made by Utah that PFS was required to show – wholly apart from whether radiological dose consequences would occur – that it met the design basis requirements of 10 C.F.R. Part 72, e.g., regarding fuel damage and fuel retrievability. (JA03592-3593). Utah made this same ar-

Footnote continued on next page

hearing was completed. A party to an administrative proceeding must structure its participation to be "meaningful" and cannot await the hearing's end to claim, based on some "cryptic and obscure reference," that some matter ought to have been considered. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978).

Utah's claim (Br. at 27) that the Board relied upon statements by PFS counsel – and not evidence – that "loss of shielding would not lead to a boundary event" is also mistaken. The discussion Utah references did not concern increased radiation from loss of shielding. Its sole focus was what would constitute a canister breach. During that discussion, PFS counsel clearly stated that "if we have an [canister] that doesn't [breach] . . . we don't have 5 [rems] at the fence." Tr. at 15,681; see also id. at 15,681-82 (JA3560). As the Board stated on reconsideration, if Utah "believed that loss of shielding remained" at issue, "it should have taken that 'last clear chance' opportunity to say so." 61 NRC at 328-29 (JA0846-0847). Utah, however, remained silent.[15]

In short, Utah – not NRC – "is trying to have it both ways." Utah Br. at 27. Having lost, Utah now seeks to fabricate new claims from whole cloth. Such gamesmanship is not to be countenanced. Vermont Yankee, supra.

Footnote continued from previous page

gument in its findings. (JA3612-3614). The Board, however, rejected Utah's argument, holding that such design basis requirements were irrelevant in determining whether an accident event was credible. LBP-05-29, B-2 (JA3881).

[15] Furthermore, supportive of the point made in Respondents brief (at 68-69) that the parties considered perforation or other damage to the cask overpack relevant only for its affect on canister integrity, PFS and Staff witnesses described the cask overpack as a "sacrificial lamb." Tr. at 19,622 (Soler) (JA3576), see also Tr. at 16,827 (JA3570), 17,329 (Bjorkman) (JA3571).

D. NRC Chose a Reasonable Methodology to Determine Canister Breach

Utah argues (Br. at 38-42) that by refusing to apply ductility ratios[16] found in a DOE Standard to determine canister breach, NRC acted arbitrarily and capriciously. However Respondents show that NRC properly chose not to apply the DOE ductility ratios relied upon by Utah because they do not apply to the type of structure, loading, or failure mode at issue here. Resp. Br, at 19-22, 76-81. Rather, the Board majority chose to rely on the actual measured properties of the stainless steel used in the canisters derived from a wide variety of experimental tests to determine canister failure. Id. As explained, by the Board majority:

> the determination of the conditions that cause failure ... is most appropriately based upon examination of the actual physical properties of [the steels at issue] under the sort of loadings expected.

61 NRC at 332 (emphasis added) (JA0851-0852). The Board majority determined that maximum tensile strains on the canisters computed by the parties were less than 10%, more than a factor of nine below the true tensile strain at which the stainless steel used for the canisters has been shown experimentally to fail. LBP-05-29 at B-18 (JA3897); LBP-05-12 at 333 (JA0852).

In an attempt to discredit the Board, Utah impermissibly argues for the first time on appeal (Br. at 40-41) that DOE applied its ductility ratios to the same problem to which the Board held the DOE Standard did not apply. The Yucca Mountain EIS, however, is not part of the record, and therefore, as Respondents note (Br. at 76 n.30), can not be considered by this Court.

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[16] A ductility ratio is the measurement of displacement compared to the maximum elastic displacement that could occur in the material at issue. 61 NRC at 332 (JA0852). The displacement at which a material would fail would be some multiple of the maximum elastic displacement. Id. at 332-33 (JA0852-0853). As noted by the Board majority, the ductility ratio at which the canister would fail is "vastly in excess" of the DOE ductility ratio that Utah seeks to apply here. Id.

Moreover, Utah's claim is wrong. The Yucca Mountain EIS did not apply the DOE ductility ratios that Utah seeks to apply here. As noted by the Board majority, the DOE ductility ratios that Utah sought to apply are used to assess the capability of a structure to carry loads. LBP-05-29, B12-B13 (JA3891-3892). They are not used to "to assess the point at which a steel component would fail by stretching to the point that it ruptures (. . . as a result of tensile loads)," the issue here. Id. Rather, for assessing such localized failures, the DOE Standard uses standard mathematical formulas.[17]

The Yucca Mountain EIS cited by Utah only used the DOE Standard to perform a local failure analysis for which it determined no failure would occur because the aircraft would not penetrate the cask. See Davis et al. (1998) at 4-6 (JA1252-1254); Yucca EIS § 7.2.1.8 at 7-30 (JA1449) (stating that Davis showed that an aircraft crash "would not penetrate the storage facility"). The Yucca Mountain EIS never used ductility ratios because they are only relevant to the capability of a structure to carry loads, and not to failure by penetration or rupture.[18]

Finally, Utah misrepresents the experimental test data presented by PFS (and the Staff) and relied upon by the Board as being limited to "a coupon test" of a "small piece of pristine steel" "measured under laboratory conditions." Utah Br. at 39. In fact a wide range of

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[17] The DOE Standard uses ductility ratios only to assess a structure's global response, i.e., to determine whether the structure can carry the imposed loads or will "collapse" or otherwise fail globally. State Exh. 254 at 14 (JA1054), 70-76 (JA1110-1116). To assess local damage for determining whether an aircraft would penetrate or perforate a structure, the DOE Standard uses formulaic methodologies. Id. at 64-70; see also Soler/MacMahon Rebuttal Testimony (JA3550); PFS Reply Findings (JA3865-3867, 3872-3873).

[18] Utah also refers to PFS using the DOE Standard during the probability phase of the proceeding. Utah Br. at 38-39. Again, PFS utilized the simplified DOE formulas for assessing localized penetration failures and did not use DOE ductility ratios. Johns Test. at 2-5 (Feb. 19, 2002) (JA1485-1488). The computer modeling simulations performed by the parties here are much more sophisticated than the DOE formulas.

experimental and physical data were presented by PFS and the Staff. This data included numerous laboratory tests, actual physical specimens of deformed stainless steel, and technical reports on field tests of stainless steel canisters.[19] All this data consistently showed that the PFS stainless steel canisters can withstand true strains on the order of 90%. The State provided not a shred of contrary data.[20] In short, to say that the data was limited to "a coupon test" of a "small piece of pristine steel" "measured under laboratory conditions" is simply untrue.

E. NRC Reasonably Excluded Cruise Missiles from the Crash Probability

Contrary to Utah's claims, Respondents show that the Board appropriately determined that the risk of cruise missile impacts at the PFSF is essentially zero based on undisputed facts that (1) no cruise missile crashes had occurred more than 1 mile from their planned flight path, and (2) no cruise missile would fly any closer than 10 nautical miles to the PFSF. Resp. Br. at 79-81.

F. NRC Reasonably Applied its Threshold Probability Standard and Used Reasonable Inputs and Statistical Methodology for its Calculation

Utah makes two related claims that NRC arbitrarily (1) applied the threshold standard as a "bright line" standard, and (2) used non-conservative input assumptions. Neither has merit.

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[19] PFS Findings (JA3812-3819); PFS Reply Findings (JA3876-3877); PFS Exhs. 290-292 (JA1703-1711), 294 (JA1712-1719), 301-305 (JA1720-1736), 307 (JA1737); Staff Exhs.91-93 (JA1739-1767), 107 (JA1738).

[20] LBP-05-29 at B13, n.98 (JA3892). The Board majority also noted that applicable safety codes assured that manufactured canisters would not contain irregularities that might weaken them. Id. at B14 (JA3893).

1. NRC Reasonably – Indeed Conservatively – Applied its Threshold Standard

Utah claims that NRC misapplied the threshold standard as a bright line. Utah Br. 32-35. Respondents show that the standard was not so applied. Resp. Br. 71-75. The calculated probability that NRC adopted was 0.737×10^{-6}, substantially below the threshold. Moreover, Utah's claim is flawed because it ignores (1) the "large conservatisms" "built into the analysis"[21] and (2) NRC's intent that the threshold probability is a "realistic estimate" of risk, not the overly conservative estimate implied throughout by Utah.

Based on four large conservatisms built into the analysis, the Board majority found that the calculated probability was a conservative, "upper bound" of the actual probability of radiological release at the PFSF.[22] As such, Utah's claims that the standard was applied as a bright line (as well as claims by Amicus State of Nevada that uncertainties were ignored) are without merit. These conservatisms were:

- The calculation assumed that all aircraft impacts onto a cask were completely radial – i.e., the aircraft hit the cask "head on." As explained at the hearing, it is much more likely that an aircraft would impact the cask tangentially, thereby imparting less momentum, and causing less damage, to the cask than a direct impact. The radial impact assumption alone roughly results in a conservatism factor of 5.

- The calculation assumed that an incoming aircraft impacting the ground within a large "skid area" in front of the casks would not be damaged, or slowed down, but would go on to impact the cask as if it had done so directly. Again record evidence showed that it is much more likely that an aircraft impacting the ground

[21] LBP-05-29, B37 (JA3916).

[22] LBP-05-29, B41 (JA3920).

in front of the casks would break apart and not significantly damage the casks. This assumption introduced a material conservatism on the order of 15%.

- The calculated probability takes no credit for the likelihood that the pilot of a crashing aircraft would direct it away from a facility on the ground, which the Board majority found, based on evidence that pilots make "good faith," even "heroic," efforts to avoid sites on the ground, "introduces another material conservatism in the computations."[23] In this respect, the State's witness in the probability hearings agreed that for "a large body" of accidents pilots would avoid the PFSF.[24]

- By its very nature the calculation methodology produces a bounding calculation. The calculated probability of 0.737×10^{-6}, referred to as the Unanalyzed Event Probability ("UEP"), does not reflect the probability of a canister breach. Rather it is unity minus the probability of those events that have been analyzed and shown not to cause a radiological release.[25] For example, PFS performed a calculation at a speed above the bounding speed used to compute the UEP of 0.737×10^{-6} which demonstrated that a radiological release would not occur at this higher speed. Using that speed as the bounding value would have reduced the calculated UEP to 0.628×10^{-6}, which is further below the threshold.[26]

LBP-05-29, B37-B41 (JA3917-3920).[27]

Furthermore, Commission guidance and precedent makes clear that the threshold standard is intended to be a "realistic estimate" of risk, not a conservative one. This is clear from NUREG-0800, which Utah cites (Br. at 33) but misconstrues. NUREG-0800 (which provides

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[23] LBP-05-29, B39-B40, n. 197 (JA3918-3919).

[24] Tr. at 8503 (JA1614) (Horstman); see also id. at 8432 (JA1611).

[25] PFS Exh. 265, supra, (JA3433-3434).

[26] Cornell Rebuttal Test. (JA3548).

guidance for Staff review of license applications) establishes a threshold probability of "approximately 10^{-7} per year" for determining credible events for reactor design. NUREG-0800 at 2.2.3-2 (JA1008). However, NUREG-0800 goes on to make clear that this threshold is a realistic, and not a conservative estimate of risk, by stating that a calculated probability as much as an order of magnitude greater – of "approximately 10^{-6} per year" – "is acceptable if, when combined with reasonable qualitative arguments, the realistic probability can be shown to be lower." Id. (emphasis added) (JA1008).[28] As discussed in Section I.A above, the Commission has determined that 10^{-6} should be used as the threshold standard for ISFSIs instead of the 10^{-7} reactor standard. CLI-01-22, 54 NRC at 265 (JA0233). Hence, the 10^{-6} threshold criterion for ISFSIs is analogous to the 10^{-7} reactor criterion, which both NUREG-0800 and CLI-01-22 establish is a "realistic probability."

Thus, Utah's argument that margin must be factored into the calculated probability because it is allegedly too close to the threshold is misplaced. Indeed, NUREG-0800, as confirmed by CLI-01-22, shows that a calculated probability significantly higher than the threshold would be acceptable when combined with reasonable qualitative arguments that show the realistic probability is in fact lower. Here, there is both: (1) a calculated probability that is substantially lower than the threshold, and (2) reasonable qualitative arguments that the realistic probability is in fact much lower than that calculated.

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[27] Another large conservatism is the margin of nine between the strains computed by the parties and the observed experimental discussed above.

[28] In CLI-01-22, the Commission confirmed that the 10^{-7} per year reactor standard in NUREG-0800 is a "realistic probability" where "conservative margins are not factored in." 54 NRC at 260 (JA0230).

In short, NRC did not misapply its guidance as claimed by Utah. Rather, as stated by Respondents (Br. at 75), NRC's determination was "a choice well within its discretion and a reasonable exercise of policy and expert judgment."[29]

2. NRC Used Reasonable Inputs and Statistical Methodology

Utah broadly argues that "[w]hen there is uncertainty, NRC must apply the more conservative of two inputs." Utah Br. at 42 (emphasis added). Utah then lists a series of allegedly non-conservative inputs chosen by NRC and claims, ipso facto, arbitrary and capricious NRC action without ever addressing the reasons NRC provided for the inputs chosen.

Utah's claim lacks logic because more conservative assumptions can always be generated. Such an approach would make NRC's safety reviews wholly mechanistic, applying "'conservatism for conservatism's sake' without regard to technical justification or accuracy." Resp. Br. at 82. Clearly, NRC precedent does not, and could not, mandate such an approach.[30]

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[29] The State of Nevada has filed an amicus brief arguing that the NRC's decision is fatally defective because uncertainties were not quantified. This issue was never raised below. Moreover, Nevada misapplies Commission guidance on probabilistic risk assessments ("PRAs"). Even in applying PRAs to modify the safety design of operating nuclear plants, NRC guidance does not require the quantification of uncertainties but only their assessment and consideration as appropriate. See, e.g., Standard Review Plan, Chapter 19 at SRP-19-5 (A-6 to Nevada Addendum). Nevada completely ignores that NRC assessed uncertainties here in the context of the "large conservatisms" built into the analyses discussed above. See 62 NRC at 419 n.67 (JA0903). These conservatisms, based on "ample record evidence," led NRC to determine that the calculated probabilities were sufficiently conservative to conclude that the postulated air craft crashes were not credible. Id.

[30] E.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 736-37 (1985) (Conservatisms and margins "must be footed to some extent in reasonable, scientific ground. Conservatism upon conservatism can distort technical data to the point where it no longer meaningfully describes the mechanism at issue."); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-76-26, 3 NRC 857, 925 (1976) ("To compound conservatisms can be misleading [and] would present a distorted picture ...."). The cases Utah cites do not support its argument. E.g., Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 707-709 (1982) (Appeal

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To do so, would nullify the Commission's ability to make the policy judgments and safety determinations called for by its uniquely broad responsibilities under the AEA. Rather, the levels of conservatism to be employed, and when they are employed, are integral to Commission policy judgments and safety determinations, and necessarily implicates substantial agency expertise entitled to great deference. Here, NRC reasonably exercised its judgment, concluding that large conservatisms built into the analysis – which Utah never mentions – sufficiently account for uncertainties. 62 NRC at 419 n.67 (JA0903).

Respondents brief (at 82-88) discusses the NRCs reasoned basis for the inputs chosen. Intervenors have but three points to add to this discussion concerning the first two bullets on Utah's list (Br. at 42-43). These bullets concern which of the historical F-16 crashes should be used as data points for calculating the crash cumulative distribution function ("CDF") and how the CDF should be fit to the data points, which is discussed in LBP-05-29 at B19-B36 (JA3898-3915).

- First, Utah's claim that fitting the data points by a discrete step function would "alone" increase the UEP "to slightly above 1 x 10^{-6} is wrong. Utah cites Judge Lam, but it is clear from the majority opinion that Judge Lam was mistaken. As the majority sets forth, the increase in the UEP that would result from both excluding certain accidents the State claims should have been excluded (discussed below) and treating the data as a discontinuous step function is 0.13 x 10^{-6}, which

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Board affirmed rejection of a more conservative estimate of maximum earthquake magnitude advanced by plant opponents); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-17, 29 NRC 519, 531 (1989) (Board found applicant's assessment of the dispatch time for emergency alert vehicles to be an "appropriate conservative estimate," even though the estimate could have been more conservative to take account of additional factors).

results in an UEP still substantially below the threshold. LBP-05-29 at B36-B37 (JA3915-3916). Indeed, the majority took note of this fact to conclude that there is "no credible argument for the position that the UEP exceeds 1.0×10^{-6}." Id. at B37 (JA3916).

- Second, while Utah suggests that only crashes with documented crash impact speeds should be used (Br. at 43), it ignores that Utah's own expert fully endorsed and utilized the regression analyses that were used by all parties to estimate crash impact speed. LBP-05-29 at B24 (JA3903) (experts representing all parties testified that regression correlations were "robust"); State Exh. 279 (JA3588-3589).

- Third, by selectively quoting from PFS's findings, Utah claims that "PFS agreed" that accidents at very low altitude and very low speed are unlikely to occur in Skull Valley, and that their inclusion "could overestimate" the likelihood of low speed crash impacts.[31] Utah Br. at 43. Utah ignores discussion in PFS's findings, however, that any such overestimation is offset by including accidents occurring at higher altitudes than typical for flights through Skull Valley flight, with higher impact speed than expected for Skull Valley. PFS Findings (JA3772-3776, 3780-3789).[32] Making an adjustment for one and not the other – as sought throughout by Utah – is to selectively parse the data and wholly improper.

II. NRC correctly Declined to Examine the Environmental Consequences of a Hypothetical Terrorist Attack

The Commission correctly ruled that evaluation of terrorist attacks under NEPA is not required because under controlling Supreme Court precedents and rulings of this Court NRC

[31] This is the same argument that Utah made in its motion for reconsideration – that PFS agreed that seven low speed crashes should be excluded because they could not reasonably be expected to occur in Skull Valley – an argument rejected by both the Board Majority and the Commission. 61 NRC at 334-36 (JA0854-0857); 62 NRC at 420-22 (JA0904-0907).

licensing of the PFSF is not the proximate cause of a subsequent terrorist attack. Supreme Court precedent makes clear that NEPA does not require agencies to consider environmental impacts for which they are not proximately responsible. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983); Department of Transportation v. Public Citizen, 541 U.S. 752 (2004). An impact whose sole link to agency action is that the impact would not have occurred "but for" the agency action is not proximately caused by that action Id. This Court has recognized and applied this principle in Glass Packaging Institute v. Regan, 737 F.2d 1083, cert. denied, 469 U.S. 1035 (1984) to hold that NEPA does not require analysis of environmental impacts caused by intervening criminal acts. As Respondents fully explain, neither Utah nor the Ninth Circuit in San Luis Obispo Mothers for Peace v. NRC [33] recognizes this core requirement of NEPA, which is critical if NEPA's scope is to remain within its Congressional bounds. Hence, Utah's claim should be rejected. Any other result would require that a terrorism analysis be appended to NEPA reviews for every dam, bridge, industrial facility and commercial enterprise.

Furthermore, based on the facts of this case, NRC reasonably concluded that the PFSF is not "inviting" to terrorists making a NEPA review unnecessary. Resp. Br. at 95.

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[32] PFS performed sensitivity analyses showing no significant changes to the UEP if one accounts for altitudes at which the accidents initiated or for altitudes at which the pilot ejected. Id.; see also PFS Exh. 320 (JA3598-3600).

[33] 449 F.3d 1016 (2006), cert. denied, 2007 WL 91455, at *1 (U.S. Jan. 16, 2007) (No. 06-466).

III. NRC Reasonably Declined to Reopen the NEPA Record to Consider an alleged change in DOE Spent Fuel Acceptance Policy

The Commission properly refused to reopen the record to consider Utah's claim that PFS will not be able to ship spent fuel to Yucca Mountain because of DOE's recent move to standardized canisters. Even accepting Utah's claim, the FEIS clearly shows that the environment impacts associated with shipping spent fuel stored at PFS somewhere else before proceeding to Yucca Mountain would be "small". 63 NRC at 29 (JA0994). Hence, Utah's claims are immaterial, and no basis exists to reopen the record or to amend the FEIS.

Furthermore, the DOE press release relied on by Utah says nothing about what canisters DOE will or will not accept at Yucca Mountain.[34] DOE has provided repeated assurances to the NRC, utilities, Congress and state officials that DOE would undertake the necessary steps to accept spent fuel in NRC-licensed canisters.[35] Nothing in DOE's press release suggests differently. In fact, DOE has directed that its contractor address ways of dealing with spent fuel stored in PFS-type canisters. 63 NRC 25-26 (JA0989). Hence, there is no basis to conclude that DOE would refuse PFS fuel.

IV. NRC Dismissal of OGD's "Environmental Justice" Contention Was Justified, Because Members of a Tribe Opposing A Project Do Not Constitute a Minority/Low-Income Population.

As pointed out in Part IV of Respondent's brief (at 111), OGD sought to raise an Environmental Justice claim of disparate environmental impacts on minority and low-income populations under Executive Order 12898. However, OGD failed because its contention (1)

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[34] It simply notes DOE's expectation that "most spent fuel would be sent to Yucca Mountain" in standardized canisters. 63 NRC at 25 (JA0989).

[35] PFS Response to Contention Utah UU (Dec. 6, 2004), Attachments 3-8 (JA1855-1872).

identified no discrete minority or low-income population as the subject of its contention; and (2) offered no basis to show that OGD was experiencing any disparate environmental impacts.

Respecting the first deficiency, NRC expressly found that:

> OGD is a group of individuals, some of whom are Skull Valley Band members, some of whom are not, some of whom live on the Skull Valley reservation, some of whom do not, all of whom are opposed to the PFS project.

56 NRC at 150 (emphasis added) (JA0315). OGD never challenged this finding. Thus, OGD is no more than a group opposed to the PFSF project. Nothing defines it as a minority or low-income population. OGD's Goshute members are a fraction of the Band's membership, a membership that authorized execution of the PFS lease, welcomed the project, and is "not complaining of environmental injustice." Id. at 156 (JA0328). If there is any relevant minority population for environmental justice purposes, it is the Band itself, but it authorized the lease and participated before the NRC in support of the application.[36]

The Board concluded in its Order that an environmental justice claim "may belong to a subgroup of the overall Tribal community." 55 NRC at 175 (JA0285). However, where that "overall Tribal community" has already acted to authorize the activity that the subgroup opposes, agency initiation of an environmental justice inquiry into "disparate impacts" on various members of the community, resulting from such a tribal decision, would undermine the overall will of the Tribal community, and defeat the modern-day policy of Indian tribal self-

[36] The Board found that "the Skull Valley Band, as representative of those living on the Reservation, was a full partner in the Applicant's plan to construct the facility." 55 NRC at 194 (JA0297).

determination recognized in various statutes and executive orders.[37] This cannot be what environmental justice means on an Indian reservation, and the Commission was justified in reversing the Board and dismissing OGD's contention.

Regarding the second deficiency, OGD's contention also failed to allege any discrete environmental impacts which would cause a disparate impact to OGD. Some members of OGD live on the reservation, as do supporters of the project.[38] As the Commission pointed out, the Board acknowledged that the environmental impacts are the same for all residents of the Reservation. 56 NRC at 154 (JA0317). The only alleged disparity centers around the claims of corruption based on a Declaration of Sammy Blackbear, attached to the June 28, 2001, OGD Response to Applicant's Summary Disposition Motion.

The Blackbear Declaration failed to identify any disparate environmental impacts. Rather, it presented a very long list of grievances against then Tribal Chairman Leon Bear, claims of unauthorized tribal actions, and unsupported allegations of corruption in the use and expenditure of various tribal moneys, including payments received by the Band from PFS. The Board then concocted a claim of environmental justice – nowhere found in OGD's contention – based on alleged disparate treatment in the distribution of the economic benefits of the PFS lease. This was properly reversed by the Commission, for failing to meet the threshold requirements of an environmental justice claim, namely some basis for alleging "disproportionately high and adverse environmental effects" in accordance with E.O. 12898. (emphasis added).

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[37] See, e.g., Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450; Consultation and Coordination with Indian Tribal Governments, E.O. 13175, § 3 (Nov. 6, 2000).

[38] See Band's Brief Seeking Reversal of LBP-02-08 (April 5, 2002) and attached exhibits (JA1520-1598).

As Respondents point out (Br. at 109-11), OGD has offered no legal argument to call into question the Commission's decision. Instead, OGD's brief twists the Record, making arguments that are both false and illogical. For example, throughout its brief, OGD refers to the Band's participation in the agency proceedings as the positions of "Leon Bear" and "Leon Bear's attorneys." OGD Br. at 2, 3-5, 7, 11-13. Leon Bear was not and is not a party to any of those proceedings. It was the Skull Valley Band which was admitted as a party in the agency proceedings in support of the license application. 47 NRC 142, 157 (1998) (JA0001, 0010). And counsel, who has represented the Band since August 2001, is counsel to the Band, not Leon Bear.

Similarly, OGD's brief (at 5) fallaciously states that PFS "entered into a secret agreement with Leon Bear" to lease tribal lands for the project. As pointed out above, NRC found that the Band as a whole had welcomed the project, which is supported both by the Board's findings[39] and also General Council Resolution 97-12A signed by over 40 adult members of the Band, authorizing the PFS lease. This is a matter of Record in the licensing proceedings.[40]

Finally, both OGD and the Band advise this Court of a newly-elected Executive Committee leading the Band, and that Leon Bear no longer holds a position of leadership.[41] There no longer appears to be any dispute between OGD and the elected Band leadership regarding its legitimacy. Nevertheless, OGD's brief (at 12) offers the following dire scenario: "If the NRC's decision denying a hearing to OGD on this matter is undisturbed, members of the

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[39] 56 NRC at 156, quoting 55 NRC at 189 (JA0318).

[40] (JA1550-1558).

[41] See letter from BIA Superintendent Chester D. Mills to Lena Knight (October 25, 2006) (JA2029).

Band may continue to suffer this environmental and economic injustice." Thus, even though Leon Bear is no longer Chairman, OGD's interpretation of Executive Order 12898 will not allow the new leadership to address such internal tribal matters without an inquiry and fact-finding by the NRC, an institution neither empowered nor suited for such a responsibility.

V. Recent Decisions By The Department of Interior Have Not Rendered This Proceeding Moot.

OGD takes the position that the recent Department of Interior decisions that revoked BIA's prior conditional approval of the lease and denied PFS a right away across BLM land render the PFS license application "fatally defective", and that the licensing proceeding has become moot. OGD Br. at 8. Utah, however, acknowledges that PFS may attempt to overcome these decisions through judicial review or some other means. Utah Br. at 14.

PFS is indeed contemplating seeking judicial review of these decisions, as is the Band. These are matters currently under active consideration by both parties.

As Respondents point out (Br. at 117-18), the validity of the NRC license is not dependent upon Interior Department approval of the lease. Overturning the Interior Department decisions would allow the parties to the lease to fully pursue the project in accordance with the terms and conditions of the NRC license. Thus, this license continues to be of great value to both PFS and the Band. This proceeding is not moot.

CONCLUSION

For the above reasons, and those presented in Respondents' Brief, the Court should deny the Petitions for Review.

Respectfully submitted,

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Addendum

ADDENDUM

Except for the following, all applicable statutes, etc. are contained in the Brief for Respondents.

LEXSTAT 25 U.S.C. 450

*** CURRENT THROUGH 109TH CONGRESS 2ND SESSION ***

TITLE 25. INDIANS
CHAPTER 14. MISCELLANEOUS
INDIAN SELF-DETERMINATION

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25 USCS § 450

§ 450. Congressional statement of findings

(a) Findings respecting historical and special legal relationship, and resultant responsibilities. The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that--

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) Further findings. The Congress further finds that--

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

Federal Register
Vol. 65, No. 218
Thursday, November 9, 2000

Presidential Documents

Title 3—

The President

Executive Order 13175 of November 6, 2000

Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. *Fundamental Principles.* In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. *Policymaking Criteria.* In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. *Increasing Flexibility for Indian Tribal Waivers.*

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. *Accountability.*

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. *General Provisions.* (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A–19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton

THE WHITE HOUSE,
November 6, 2000.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OHNGO GAUDADEH DEVIA, et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, Respondents, and PRIVATE FUEL STORAGE, L.L.C. and SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors.	Nos. 05-1419, 05-1420, and 06-1087 (consolidated)

Pursuant to Rule 32(a)7(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(3)(B), undersigned counsel for Intervenor Private Fuel Storage, L.L.C. certifies that the number of words in the Brief of Intervenors Private Fuel Storage, L.L.C. and Skull Valley Band of Goshute Indians, is 8700 as counted by Microsoft Word..

Respectfully submitted,

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Dated: March 15, 2007

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Brief of Intervenors Private Fuel Storage, L.L.C. and Skull Valley Band of Goshute Indians were served upon the following by United States mail, first class, postage prepaid, on this 15th day of March, 2007:

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